STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of TINA MARIE SPACK.

CORA ROBERTS, Personal Representative of the Estate of TINA MARIE SPACK,

Plaintiff-Appellee,

V

DEBORAH DUNNEM,

Defendant-Appellant.

UNPUBLISHED
June 13, 2013

No. 309967
Macomb Probate Court
LC No. 2010-201471-CZ

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

In this suit to recover estate property, defendant Deborah Dunnem appeals by right the probate court's judgment of $90,280.20 in favor of plaintiff Cora Roberts in her capacity as the personal representative of the Estate of Tina Marie Spack. For the reasons explained below, we affirm in part and reverse in part.

I. BASIC FACTS

Spack had two children: Dunnem and Charles Randolph. After Spack's husband died in 1990, Spack decided to add Dunnem as an account holder and signer on her bank accounts; she did this so Dunnem could assist her with her banking and financial affairs.

In 2001, Spack executed a quitclaim deed conveying her real property to herself and Dunnem as joint tenants with rights of survivorship. Testimony established that she chose not to deed the property to both Dunnem and Randolph because Randolph had unresolved federal tax issues and liens against his own property, which she felt might affect her property too. Testimony nevertheless showed that Spack intended that her real property be divided equally between Randolph and Dunnem.

Spack executed a will in 2002. In her will, Spack did not specifically address her real property or her bank accounts. Rather, she directed that the residue of her property be distributed equally to Dunnem and Randolph.

Spack opened a certificate of deposit in 2007 and designated Dunnem as the sole beneficiary.

Spack died in 2008. After Spack died, Dunnem liquidated Spack's savings and certificate of deposit accounts and took the $17,427.88 for her own use. She also sold the real property that she had held jointly with her mother and received an additional $59,414.82.

Roberts, who is Spack's sister, eventually sued Dunnem to recover the proceeds from the real property sale and the money from the liquidated accounts. She alleged that Dunnem unjustly and inequitably retained this property in contravention of Spack's clear intent to divide her property equally between her children. Roberts asked the probate court to impose a constructive trust over the property.

After a bench trial, the probate court found that Spack had intended to divide her property equally between her children. Accordingly, it ordered Dunnem to turn over the proceeds from the liquidation of the accounts and sale of the real property to the estate. Dunnem then appealed to this Court.[1]

II. CONSTRUCTIVE TRUSTS

A. STANDARDS OF REVIEW

Dunnem first claims that the probate court erred by imposing a constructive trust over the property she jointly held with the decedent. Specifically, Dunnem contends that the probate court could not, as a matter of law, impose a constructive trust over the real property because she is the rightful and legal owner of the property as the sole surviving tenant. She also contends that the imposition of a constructive trust violates the statute of frauds. This Court reviews the probate court's factual findings for clear error. *In re Estate of Raymond*, 483 Mich 48, 53; 764 NW2d 1 (2009). Courts will impose a constructive trust under limited circumstances where a party was unjustly enriched at another's expense as an equitable remedy. *Kammer Asphalt Paving Co v East China Twp Sch*, 443 Mich 176, 185-186; 504 NW2d 635 (1993). "Whether a grant of equitable relief is proper under a given set of facts is a question of law that this Court [] reviews de novo." *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 371; 761 NW2d 353 (2008). A finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake was made. *Id.* at 387. This Court also reviews de novo the proper application of the statute of frauds. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

[1] We note that, contrary to Roberts' claim on appeal, this Court has jurisdiction to consider Dunnem's claims under MCR 5.801(B)(2).

B. OWNERSHIP

Here, there was evidence that Spack conveyed her real property to herself and Dunnem on condition that Dunnem would give her brother his one-half interest after Spack's death; that is, there is evidence that Spack did not make an effective gift of her property to Dunnem. See *Osius v Dingell*, 375 Mich 605, 611; 134 NW2d 657 (1965). In any event, assuming that the deed entitled Dunnem to the real property by operation of law after Spack's death, see *Klooster v City of Charlevoix*, 488 Mich 289, 303; 795 NW2d 578 (2011), the probate court could still impose a constructive trust over the property. As our Supreme Court has explained, courts may impose a constructive trust on a legal titleholder as an equitable remedy "[w]hen the property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest[.]" *Kent v Klein*, 352 Mich 652, 656; 91 NW2d 11 (1958).

In order to warrant the imposition of a constructive trust, the party seeking relief must show that the property was "obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property[.]" *Kammer*, 443 Mich at 188 (quotation marks and citations omitted). A constructive trust remedy may be appropriate where there has been a breach of fiduciary or confidential relations. *Chapman v Chapman*, 31 Mich App 576, 578-580; 188 NW2d 21 (1971). "[I]t is not necessary that the property be wrongfully acquired" to impose a constructive trust over property; rather, "[i]t is enough that it be unconscionably withheld." *Kent*, 352 Mich at 657; see also *Grasman v Jelsema*, 70 Mich App 745, 752; 246 NW2d 322 (1976). "[I]f circumstances are such as to render it inequitable for the holder of the legal title to retain the same, the court may charge it with a trust in favor of the equitable owner." *Digby v Thorson*, 319 Mich 524, 538; 30 NW2d 266 (1948) (quotation marks and citation omitted). In fact, "[t]his form of trust is practically unlimited in extent and is employed whenever, in the opinion of the court, it becomes necessary to prevent a failure of justice." *Id.*

Here, there was compelling evidence that Spack did not intend her real property to go solely to Dunnem; she intended the real property to go to both Randolph and Dunnem equally. The notary who prepared and witnessed the deed stated that Spack did not include her son on the deed along with Dunnem for the sole reason that the state and federal governments had placed liens on Randolph's property and she feared that her property would also become encumbered if she named Randolph as a joint tenant.[2] The notary further testified that Spack "put [the deed] in her daughter's name . . . with the understanding that it was to be split, 50/50." Randolph corroborated this testimony. He said that his mother wanted to name him on the deed but he told her not to do so because of the outstanding liens against his property. He further stated that Dunnem knew that their mother wanted the property to be divided equally between them.

[2] Notably, the federal and state tax liens against Randolph's property were not released until 2010.

Although Dunnem testified that she believed her mother intended to leave the real property solely to her, the probate court did not find her testimony to be credible. And the court's credibility determination is amply supported by the record. Aside from the testimony by the notary and Randolph, the probate court considered Dunnem's letters to Randolph in which she indicated that she knew that their mother intended to divide the property or its proceeds equally with him and referred to the property as "ours." Furthermore, there was no evidence tending to suggest that Spack would have wanted to exclude Randolph. To the contrary, testimony indicated that she had a close relationship with both children, never showed "a dislike" for any of her children, and never showed favoritism toward either child.

Similar to *Kent*, the facts here involve a decedent placing trust and confidence in a family member to handle the decedent's wishes. See *Kent*, 352 Mich at 656. It is evident that Spack entrusted her property to Dunnem because she believed that Dunnem would carry out her wishes. The record evidence further established that Dunnem knew that her mother had entrusted the property to her with the intent that Dunnem would split the proceeds with her brother, but that she betrayed that trust to unjustifiably retain the entire proceeds for her own benefit. Given these facts, the trial court could properly impose a constructive trust to prevent Dunnem from being unjustly enriched at her brother's expense and in direct contravention of her mother's wishes. *Id.* at 655-656. Contrary to Dunnem's argument on appeal, "it is not necessary that the property be wrongfully acquired" to impose a constructive trust over property. Rather, "[i]t is enough that it be unconscionably withheld." *Id.* at 657. And it would be plainly unconscionable for Dunnem to retain the proceeds from the sale of the real property under the facts found by the probate court.

C. STATUTE OF FRAUDS

Michigan's statute of frauds, MCL 566.106, generally requires a writing to support a transfer of real property, including the creation of a trust over real property. It is well-settled, however, that the imposition of a constructive trust is not barred by the statute of frauds. See *Thurn v McAra*, 374 Mich 22, 24-25; 130 NW2d 887 (1964) (stating that the statute of frauds is not a "weapon in the arsenal of those who would otherwise be unjustly enriched by their own wrongdoing"); *Kent*, 352 Mich at 656-657. Rather, a constructive trust is an equitable remedy that arises by operation of law to prevent unjust enrichment. *Kammer*, 443 Mich at 185-186. And, indeed, our Legislature has specifically exempted constructive trusts from the statute of frauds. MCL 566.107. Accordingly, the statute of frauds does not apply and parol evidence is admissible to establish the grounds for imposing a constructive trust. *Stephenson v Golden*, 279 Mich 710, 747-750; 276 NW 849 (1937); *Robair v Dahl*, 80 Mich App 458, 462-464; 264 NW2d 27 (1978).

III. EVIDENTIARY ISSUES

A. STANDARD OF REVIEW

Dunnem also argues that the trial court erred when it permitted Randolph and the notary to testify about Spack's intent in contravention of Michigan's dead man statute, MCL 600.2166. She also maintains that the notary's testimony was improper hearsay testimony, as was Randolph's testimony about his mother's intent. This Court reviews the probate court's

evidentiary decisions for an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). This Court, however, reviews de novo the proper interpretation and application of the laws governing the admission of evidence. *Campbell v Dep't of Human Servs*, 286 Mich App 230, 235; 780 NW2d 586 (2009).

B. DEAD MAN STATUTE

Dunnem did not object to Randolph and the notary's testimony on the grounds that it was barred under MCL 600.2166. Therefore, she waived that claim of error. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). In any event, we conclude that MCL 600.2166 did not apply to bar this testimony. See *In re Backofen*, 157 Mich App 795, 801; 404 NW2d 675 (1987) (stating that MCL 600.2166 was superseded by MRE 601).

C. HEARSAY

At the bench trial, the notary testified that she prepared the deed and witnessed Spack execute it:

> The only reason that I was told it was prepared this way is because my cousin Chuck [Randolph] had legal issues. She was afraid that they [the IRS and State of Michigan] were going to come and take her house out from underneath her. She didn't want that to happen. So she put it in her daughter's name, Debbie[']s, with the understanding that it was to be split, 50/50.

While this testimony is hearsay, MRE 801(c), it was admissible under MRE 803(3).

Under MRE 803(3), hearsay is admissible if it is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." There is no dispute that Spack's state of mind is a critical issue in this case. The crux of Roberts' claim is that Spack intended that her real property be divided equally between her two children notwithstanding the terms of the deed. Consistent with MRE 803(3), the notary's testimony was relevant to show Spack's state of mind at the time she executed the deed—that is, to show that she executed the deed with the intent to convey the property to Dunnem so that Dunnem could later split it with her brother. The testimony further explained why Spack chose not to include Randolph on the deed. "Assertions indicative of a declarant's state of mind have always been admissible when mental state has been at issue[.]" *Aetna Life Ins Co v Brooks*, 96 Mich App 310, 313; 292 NW2d 532 (1980). The probate court did not abuse its discretion by admitting this testimony under MRE 803(3). *Chmielewski*, 457 Mich at 614.

Dunnem asserts that the notary's testimony cannot be admissible under MRE 803(3) because MRE 803(3) only applies to a declarant's statements relating to a will. Explicitly excluded from the exception under MRE 803(3) is "a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." MRE 803(3). However, the statements here do not involve Spack's memories or beliefs. Although the decedent's statement indicating her fear or belief that she

would lose her house if she added her son to the deed could arguably be characterized as a "statement of belief," it was not offered to prove the facts believed—that is, it was not offered to prove that her son had legal issues that could cause her to lose her house if she named him in the deed.[3] Instead, the statements were offered to show her intent in executing the deed; specifically, her intent to convey the property to Dunnem as part of an estate plan that would benefit both her children.

Dunnem also briefly argues that Randolph's testimony was not subject to the hearsay exception provided under MRE 803(3). Randolph's testimony that his mother intended to convey her property to both children was relevant and admissible under MRE 803(3) to show Spack's then existing state of mind. Moreover, Randolph's own statements to his mother were admissible to show the effect that those statements had on his mother even though they were not admissible to prove the matter asserted. MRE 801(c); see also *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of America v Dorsey (On Remand)*, 273 Mich App 26, 40; 730 NW2d 17 (2006).

The probate court did not abuse its discretion in admitting the notary and Randolph's testimony.

IV. SPACK'S ACCOUNTS

A. STANDARDS OF REVIEW

Dunnem next claims that the probate court improperly determined that Spack's savings and certificate of deposit accounts belonged to the estate. This Court reviews a trial court's findings for clear error. *In re Estate of Raymond*, 483 Mich at 53. However, we review de novo the proper application and interpretation of the law. *Velez v Tuma*, 492 Mich 1, 11; 821 NW2d 432 (2012).

B. ANALYSIS

The trial court did not clearly err when it found that Spack's savings account belonged to her estate and, accordingly, ordered Dunnem to return the proceeds to the estate.[4] *In Re Estate of Raymond*, 483 Mich at 53. Although Dunnem claims she had survivorship rights in the account, there was no evidence to support her contention. Notably, the signature card designated her as a signatory and account holder but did not indicate that she had survivorship rights in the account. A joint account does not automatically carry a right of survivorship. *Leib v Genesee Merchants*

[3] There was independent testimony and evidence establishing that Randolph had ongoing tax issues, which resulted in liens against his own property.

[4] Dunnem's argument on appeal specifically concerns the decedent's bank account ending in 6995, which is a checking account. It is evident, however, that plaintiff's claim, as well as the court's order, involves the decedent's savings account ending in 0792.

Bank & Trust Co, 371 Mich 89, 95; 123 NW2d 140 (1963).[5] In the absence of an explicit statement of survivorship in the account, "the intent of the parties can be founded upon other admissible evidence." *Id.* at 92-95; *In re Estate of Cullmann*, 169 Mich App 778; 426 NW2d 811 (1988).[6] Considering the lack of any explicit designation on the account's signature card providing for survivorship rights, the lack of any evidence that Spack intended the account to pass solely to Dunnem, and the undisputed testimony indicating that Spack added Dunnem to her account only to enable Dunnem to assist her with her banking and financial affairs, we cannot conclude that the trial court clearly erred when it found that Spack did not intend to convey this account to Dunnem. *Leib*, 371 Mich at 95.

We conclude, however, that the trial court clearly erred when it found that the certificate of deposit was an asset of the estate. *In re Estate of Raymond*, 483 Mich at 53. Unlike the savings account at issue, there is no dispute that Spack specifically designated Dunnem as the beneficiary. There was no evidence directly stating that Spack intended this account to be divided equally among her children. The court also did not differentiate between the certificate of deposit, which Spack established in 2007, and the savings account, which Spack established in 1990. There was strong evidence that Spack added Dunnem to her savings account to aid with her financial transactions, but there was no evidence that the same was true of the certificate of deposit.[7] Having failed to demonstrate a clear contrary intent to negate Spack's beneficiary designation, there is no evidence to establish that Dunnem "unconscionably withheld" the proceeds of the certificate of deposit account in breach of her confidence, trust, and relationship with Spack. *Kent*, 352 Mich at 656-657. Accordingly, the probate court erred in imposing a constructive trust over those proceeds.

V. CONCLUSION

The trial court did not err when it imposed a constructive trust over the proceeds from the sale of the real property that Spack deeded to herself and her daughter. It also did not err when it imposed a constructive trust on the proceeds from Spack's savings account. Contrary to Dunnem's claim on appeal, there was ample record evidence to support the trial court's finding that Spack intended these proceeds to go to both her children as part of her overrall testamentary design. Nevertheless, given the paucity of evidence concerning the certificate of deposit, we coinclude that the trial court clearly erred when it found that Spack intended the certificate of

---

[5] Dunnem contends that the account was a statutory joint account. MCL 487.716. However, Dunnem did not present a statutory joint account contract and there was no evidence indicating that one was ever created.

[6] Even if Dunnem had survivor rights in the account, the presumption in favor of survivorship set forth in MCL 487.703 can be rebutted. *Leib*, 371 Mich at 93. And there was record evidence from which the trial court could find that the presumption had been rebutted.

[7] The only testimony specifically discussing the certificate of deposit account was Randolph's testimony that the account was intended to be used to help pay for funeral expenses, which does not necessarily indicate an intent that Dunnem not receive the proceeds from the certificate of deposit upon her death.

deposit to be divided equally between both children. For that reason, we reverse the probate court's decision in part and remand this case to the probate court to amend its judgment to reflect that Dunnem is the sole beneficiary of the certificate of deposit.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jursidiction. Neither party having prevailed in full, neither may tax their costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Mark T. Boonstra